ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Amendment of 47 C.F.R. §1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings	)	GC Docket No. 95-21

TO: The Commission

COMMENTS OF PRESS BROADCASTING COMPANY, INC.

1. Press Broadcasting Company, Inc. ("Press") hereby submits its Comments in response to the Notice of Proposed Rulemaking ("NPRM"), FCC 95-52, released February 7, 1995, in the above-captioned matter. As set forth in more detail below, Press urges the Commission not to take any actions which would put the due process rights of parties before the Commission at even greater risk than they already are.

2. As the Commission is aware, Press has itself been the victim of extraordinary ex parte violations in a quasi-adjudicatory matter before the Mass Media Bureau. See Rainbow Broadcasting Company, 9 FCC Rcd 2839 (1994), appeal pending sub nom. Press Broadcasting Company, Inc. v. FCC, No. 94-1439 (D.C. Cir., oral argument scheduled for April 17, 1995). This first-hand experience has provided Press practical insight into one of the foci of the NPRM, i.e., the applicability of the ex parte rules relative to quasi-adjudicatory proceedings. While the Commission is proposing to narrow that scope considerably -- and thus tolerate, if not encourage, ex parte contacts in such

proceedings -- the fact is that such an approach is contrary to basic notions of fairness and due process and should be avoided.

3. In adopting the ex parte rules, the Commission explained the fundamental need for such rules:

> The right of every person to a decision based on the merits of his case is rooted as deeply as any concept in the foundation of our judicial system. It is the touchstone of a society built on the rule of law.

Ex Parte Presentations, 5 R.R.2d 1681, 1684 (1965). In reviewing those rules in 1987, the Commission again articulated their broad purpose, i.e.,

> to assure that the agency's decisions are based upon a publicly available record rather than influenced by off-the-record communications between decisionmakers and outside persons. [footnote omitted] This objective is grounded upon basic tenets of "fair play" and "due process" that are embodied in the Constitution and other laws and which, we believe, are indispensable to preserving the public's trust and confidence in the integrity of the Commission's processes.

Ex Parte Rules, 62 R.R.2d 1755, 1761-1762 (1987). Plainly, the Commission has, consistently from their inception, viewed its ex parte rules to be a mechanism to preserve fundamental, constitutionally-based fairness and due process.

4. For 30 years, the Commission has deemed certain quasi-adjudicatory proceedings to be "restricted" and, thus, subject to a prohibition against ex parte communications. See, e.g., Ex Parte Presentations, 5 R.R.2d 1681, 1689-1690 (1965). In its most recent review of the ex parte rules, the Commission reaffirmed this position. See Ex Parte Rules, 62 R.R.2d 1755, 1768-1769 (1987).

5. The Commission's decision to apply the prohibition to

such proceedings was not a matter of specific statutory compulsion -- at the time the rules were first adopted, the Administrative Procedure Act ("APA") did not contain any specific provisions relative to ex parte communications. By the time the rules were revisited in 1987, the APA did contain such provisions, but those provisions did not, by their terms, address quasi-adjudicatory proceedings. See 5 U.S.C. §557(d). Still, cognizant of its own procedures and operations, and noting again the fact that ex parte prohibitions are rooted in basic constitutional notions of due process and fairness, the Commission continued to endorse its own more extensive prohibitions. 62 R.R.2d at 1763.

6. In so doing, the Commission was following the suggestion of Congress. In adopting the ex parte provisions of the APA, Congress acknowledged that some agencies (such as the Commission) had already adopted their own ex parte rules. According to the House Report accompanying this legislation,

> The ex parte rules established by [the APA] are not intended to repeal or modify the ex parte rules agencies have already adopted by regulation . . .. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

H.R. Rep. 94-880, reprinted in U.S. Code Cong. & Admin. News, 2183, 2201. In other words, the APA was designed to provide a general floor, a minimum across-the-board prohibition applicable to all agencies. To the extent that individual agencies' particular decisionmaking functions warranted additional ex parte

safeguards, Congress was clearly encouraging those agencies to develop and implement such safeguards.

7. It is thus disquieting for the Commission to propose, in the NPRM, to pare back its own ex parte rules to conform with the relatively limited protections afforded by the APA. The APA was not designed with the Commission's processes in mind. To the contrary, the APA provides simply a bare-bones limit applicable to any and all agencies, regardless of the nature of their particular activities. Since the Commission itself had, both before and after the enactment of the APA, utilized significantly more stringent rules designed by the Commission with the Commission's own specific decisionmaking activities in mind (see, e.g., Ex Parte Presentations, 5 R.R.2d at 1685, ¶5), the sudden, apparently unjustified (see infra) proposal to abandon those more stringent rules raises serious questions.

8. This is especially so in view of the fact that, in the NPRM, the Commission cites Louisiana Association of Independent Producers v. FERC, 958 F.2d 1101 (D.C. Cir. 1992), as justifying the proposed relaxation. See NPRM at ¶¶17-18. Louisiana Association involved an agency's quasi-legislative activities, not its quasi-adjudicatory activities. The Courts have drawn a clear distinction between the two types, and have held that an agency has considerably more due process flexibility when acting in a quasi-legislative, as opposed to quasi-adjudicative, role. See, e.g., Association of National Advertisers v. FTC, 627 F.2d 1151 (D.C. Cir. 1979); Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970); Power Authority

of the State of New York v. FERC, 743 F.2d 93, 110 (2d Cir. 1984); ATX, Inc. v. Dep't of Transportation, No. 94-1302 (D.C. Cir., decided December 16, 1994); Ex Parte Rules, 62 R.R. 2d at 1762, n.3. Cf., e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 542 (1978). Reliance on Louisiana Association for the relaxation of ex parte restrictions in quasi-adjudications is not sound.

9. Neither is the Commission's further attempted justification for its proposal valid. The Commission seems to reason that, because of the supposed difficulties in determining when a quasi-adjudicatory proceeding is subject to the ex parte rules, no such proceeding should be so subject. NPRM, 7-8. But, acknowledging the obvious unacceptability of improper, undisclosed communications in such proceedings, the Commission suggests that a "permit-but-disclose" rule will safeguard due process in such proceedings.

10. There are multiple problems with this "rationale". The "permit-but-disclose" approach can work only if the parties to affected proceedings know that they are, in fact, subject to "permit-but-disclose" restrictions. If the parties do not understand themselves to be so subject, "permit-but-disclose" will afford no safeguards at all.

11. The Commission addresses that problem by attempting to refine the definition of proceedings which will be subject to "permit-but-disclose" requirements. But that suggests that any problem which might exist here inheres in that definition, and not in the nature of the restrictions applicable to proceedings

falling within that definition. In other words, if the problem which the Commission perceives is really one of defining which proceedings should be subject to restrictions, then let's focus on that problem, modify the definition as appropriate, and leave the restrictions in place.

12. So limiting the proposed revisions is important because the Commission already has "permit-but-disclose" rules which have proven themselves to be largely ineffective. For example, in an informal adjudicatory proceeding involving a dispute concerning interference alleged to be caused by Channel 14, Arlington, Virginia, multiple ex parte communications occurred in February and early March, 1994; no record of those communications surfaced until late April, 1994 (and, in at least one case, May, 1994). The Commission's track record on assuring prompt compliance with "permit-but-disclose" rules is thus questionable. [1/]

13. The same is true of the Commission's track record with respect to the substance of "permit-but-disclose" memoranda. For example, the record of the Personal Communications Service/Pioneers Preference proceeding reflects countless such memoranda which contain absolutely no information concerning the substance of the ex parte contacts apart from the broadest, most general statements. These memoranda apparently (albeit

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[1/] This is not to mention the Rainbow case, where, despite the fact that the Commission was on notice of a likely violation of the ex parte rules within approximately six weeks of the violation -- and even earlier, if the admonitions of the Commission's own staff counsel had been heeded -- the Commission declined to disclose anything about the underlying ex parte contacts for some seven months, and then only as a result of extraordinary judicial intervention.

inexplicably) satisfied the Commission's interpretation of adequate disclosure for "permit-but-disclose" statements, even though they contained nothing which could have put anyone on notice of the actual nature of the communications.

14. Thus, while the notion of "permit-but-disclose" may seem, in theory, to be a potentially appropriate manner of dealing with ex parte contacts, the Commission's own historical implentation of that very approach strongly suggests that it is just a mechanism for creating the appearance, but not the reality, of due process protection. [2/] Press strongly opposes the relegation of all quasi-adjudicatory proceedings to the status of "permit-but-disclose". Such a relegation -- which would affect a substantial portion of the Commission's day-to-day non-rulemaking activities -- would effectively eliminate any serious constraints against ex parte contacts, and thus open such proceedings up to a Wild West scenario, where each litigant is effectively encouraged to get itself a hired ex parte gun to take its best shot at swaying the staff off the record, confident that, by the time any reference to anything that might have actually been said makes it onto the record, the damage will have been done.

15. There is a further conceptual difficulty with the Commission's facile statement that it perceives no reason why

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[2/] The Commission seems to concede the historical ineffectiveness of the "permit-but-disclose" approach when it proposes to modify the requirements of that approach. NPRM at, e.g., ¶¶44-45. In light of that apparent concession, it is doubly odd that the Commission would propose to consign all quasi-adjudications to "permit-but-disclose" status.

quasi-adjudications should be treated as restricted. NPRM at ¶25. In making that claim, the Commission excepts from the universe of "quasi-adjudications" situations involving mutually exclusive applications which will have to be designated for hearing; such situations are, in the Commission's view, properly viewed as "restricted". But others, which may be appropriate for some form of evidentiary hearing, are to be deemed non-restricted and, thus, not subject to ex parte prohibitions.

16. Such an approach appears to constitute an inappropriate, premature prejudgment of the merits of such quasi-adjudicatory proceedings (e.g., applications subject to petition to deny or other objection). That is, by characterizing such proceedings as not subject to ex parte restrictions, the Commission seems to be concluding that, unlike situations involving mutually exclusive applications, other quasi-adjudications will not be designated for hearing and thus are not entitled to protection from ex parte contacts. But that conclusion prejudges the underlying merits of such proceedings: after all, if the petition/objection is deemed to raise a substantial question of fact, then designation for hearing is statutorily mandated. If pre-designation proceedings involving mutually exclusive applications are entitled to protection, then why not pre-designation proceedings involving petitions or objections to applications?

17. The numerous questions surrounding the Commission's proposals, in turn, raise an even more fundamental question concerning the genesis of those proposals. According to the

NPRM, the perceived need for the proposed changes arises from "[the Commission's] experience over the past seven years" and the "appear[ance of] the existence of persistent questions" regarding the ex parte rules, NPRM at ¶8. But at no point in the NPRM does the Commission give any indication of what particular "experience" dictates the need for the proposed changes. Similarly, it offers no clue as to precisely when, or in what context(s), or by whom, the "persistent questions" may have been raised.

18. Indeed, despite the fact that the majority of the NPRM (some 27 of 40 substantive paragraphs) is addressed to the question of changing the status of quasi-adjudicatory cases, the only particular quasi-adjudicatory case cited in the NPRM in which there appears to have been even a claim of confusion about the reach of those rules was Rainbow Broadcasting Company, 9 FCC Rcd 2839 (1994), cited at Footnote 23 of the NPRM. [3/]

19. It is therefore far from clear that any real basis exists for the change which the Commission is proposing here.

[3/] As Press has argued in the Rainbow case, any claim of "confusion" there is completely undermined by the fact that the ex parte violations occurred after the Managing Director had provided all parties with written notice that the proceeding was "restricted" and that ex parte communications were prohibited, and after a Commission staff attorney had orally advised the supposedly confused party on a number of occasions that the proceeding was "restricted". In Press' view, then, the Rainbow case does not constitute good authority for the notion that the rules are themselves confusing in any way, or that any serious problem of confusion actually exists in the real world. See Ex Parte Rules, 62 R.R.2d 1755, 1784, ¶91 (1987) (indicating that even if a party disagrees with a staff determination concerning ex parte restrictions, the party is expected to comply with the determination or seek a further ruling on the matter from the General Counsel).

Press submits that, where the Commission proposes to substantially reduce the due process protections to which litigants before it will be entitled, the Commission should first provide some real demonstration of some real need for that action. As the record of this proceeding now stands, the sole basis offered is the perceived need to address a "problem" which appears to have arisen -- without any sound basis, see Footnote 3, supra -- in only one case cited in the NPRM. That is not an adequate basis for the proposed changes.

20. Press has no objection to any effort by the Commission to shore up the ex parte rules which, as discussed above, have in Press' experience been less than effective. To the extent, also discussed above, that the changes proposed in the NPRM are primarily cosmetic changes designed to mask and/or validate that ineffectiveness, Press opposes them.

Respectfully submitted,

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April 13, 1995

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 13th day of April, 1995, I have caused copies of the foregoing "Comments of Press Broadcasting Company, Inc." to be hand delivered (as indicated below) or placed in the United States mail, first class postage prepaid, addressed to the following individuals:

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